Supreme Court, U.S.
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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

GLORIA SARNO, G.M.F.C., INC.,
GLORIA MARSHALL SALON OF TORRANCE,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ of Certiorari
To The Second District Court Of Appeal
Of The State Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A Los Angeles trial court entered a $400,000 judgment and a permanent injunction against Petitioners the instant they were made parties (their names were written into the judgment after a trial between Respondent and named defendants of that action). The trial court stated that Petitioners were in an alter ego relationship with the corporate defendant but never gave Petitioners the opportunity to dispute this allegation. Petitioner's complaint in equity to have the judgment set aside as void for lack of jurisdiction was dismissed by the trial court.

1. Is it consistent with the Due Process Clause of the Fourteenth Amendment of the Constitution to deny non-parties all meaningful opportunity to be heard before or after adding them to a substantial judgment and prior to permanently depriving them of substantial property interests?

2. Did the California Court of Appeal err in not following the recent unanimous Supreme Court holding in Donald E. Nelson v. Adams USA, Inc. (April 25, 2000) ___ U.S.___, 120 S.Ct. 1579, 146 L.Ed.2d 530, which held that due process affords every party the opportunity to defend?

3. Should the holding in Donald E. Nelson v. Adams USA, Inc. (April 25, 2000) ___ U.S.___, 120 S.Ct. 1579, 146 L.Ed.2d 530, be extended to apply to non-parties named based upon an alleged alter ego relationship with a corporate party?

4. Is California's Code of Civil Procedure §187 (broad powers given to judicial officers to make suitable orders to enforce judgments) unconstitutional as violative of one's federal due process rights when applied to enter a judgment against someone the instant the person is made a party to the proceeding?

LIST OF PARTIES

The parties to this Petition are Gloria Sarno (formerly known as Gloria Bergendahl nee Gloria Marshall), G.M.F.C., Inc, a California Corporation, Gloria Marshall Salon of Torrance, a California general partnership (Petitioners), and People of the State of California (Respondent).

Additional parties in the proceedings below but not parties to this Petition include State of California, County of Los Angeles, Los Angeles County Sheriff's Department (named parties to trial court proceedings below, #BC202691, but not to any appeals), Gloria Marshall Figure Salons of Australia Pty. Ltd., an Australian Corporation, and G.M.F.C. (Aust.) Pty. Ltd., an Australian Corporation (named parties to trial court proceeding below and to appeal to Second District Court of Appeal for the State of California, #B130037, but not to the California Supreme Court#S089232).

Additional parties not a part of the proceedings directly below but which were named parties to the companion case, #BC121888, include Gloria Marshall America, Inc., a California corporation, F.B.S., Inc., a California corporation, Mark Bergendahl and his wife, Kellee Bergendahl (named Defendants to original action). Additional parties not a part of the proceedings directly below but became parties to the companion case #BC121888 upon entry of judgment include Redfield Taylor Associates, Inc., Gloria Marshall of Utah, Inc., Gloria Marshall International, Inc., and International Health Industries Ohio, Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioner G.M.F.C. is a private corporation organized and existing under the laws of the State of California. Petitioner G.M.F.C. does not have a parent corporation nor does any publicly held company own 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners GLORIA SARNO, G.M.F.C., INC., and GLORIA MARSHALL SALON OF TORRANCE, respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the Second District Court of Appeal for the State of California entered on May 9, 2000.

OPINIONS BELOW

The opinion and judgment of the Second District Court of Appeal for the State of California (#B130037) filed May 9, 2000 affirming the order of the trial court can be found at Appendix pages 3 through 12[1]. the court's denial of Petitioners' petition for rehearing can be found at App. 2. The Supreme Court for the State of California's (#S089232) denial of Petitioners petition for discretionary review is contained at App. 1. The order of the superior court of California for the County of Los Angeles (#BC202691) of March 2, 1999 which ordered the dismissal of Petitioners' action of March 2, 1999 can be found at App. 13 - 14. The order of the superior court of February 8, 1999 sustaining Respondent's demurrer to Petitioners' First Amended Complaint without leave to amend can be found at App. 15 - 16.

JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeal for the Second District Court of Appeal of the State of California was entered on May 9, 2000 (App. 12) and the Order of the California Supreme Court denying Petitioner's petition for discretionary review was filed July 26, 2000 (App. 1). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

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[1] "App." shall mean the separate volume of appendices.

CONSTITUTIONS AND STATUTES INVOLVED IN THE CASE

Amendment 14, Section 1, Clause 3 of the United States Constitution (App. 70 - 71); California Code of Civil Procedure §187 (App. 71).

STATEMENT OF THE CASE

On February 14, 1995, Respondent commenced a lawsuit against F.B.S., Inc.[2], a California corporation, Gloria Marshall America, Inc.[3], a California corporation, Mark Bergendahl, and Kellee Bergendahl[4], alleging various deceptive business practices (#BC121888). Full ownership of all stock of F.B.S., Inc. was held by Defendants Mark and Kellee Bergendahl.

From the inception of the lawsuit through the date of the trial (April 1997), Respondent sought discovery from the defendants and also from several non-parties including Petitioners herein directed to the issue of establishing an alter ego relationship between F.B.S., Inc. and these non-parties.[5]

During this pre-trial period, discovery issues arose between Petitioners and Respondent. Petitioners asked the attorneys for the defendants to represent Petitioners in the discovery disputes. On February 14, 1997, Petitioners substituted out these attorneys and substituted in their own separate attorneys.

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2 formerly known as "Gloria Marshall America, Inc"

3 Subsequently known as F.B.S., Inc.

4 Wife of Mark Bergendahl.

5 Respondent, through the State Attorney General's office, had also pursued discovery from Petitioners for a year before the lawsuit with its administrative subpoena power.

On or about March 6, 1997, Respondent filed a motion for leave to add Petitioners (and others) to the lawsuit as defendants based upon the alter ego doctrine. The motion was denied. The defendants made a motion to exclude all evidence concerning an alleged alter ego relationship between Petitioners (and other non-parties) and Defendant F.B.S., Inc. The court denied the motion to exclude the evidence.

When the trial began on April 7, 1997, the trial court denied Petitioners request to be present and denied Petitioners' attorney's request to participate stating that Petitioners were witnesses and witnesses only and that witnesses were excluded from the courtroom based upon its order excluding all non-party witnesses.

At the conclusion of the trial, Respondent submitted a detailed proposed Statement of Decision and final judgment which not only included the names of the defendants of that action but also Petitioners (and several other non-party defendants) as liable parties. The trial court signed Respondents' version of the Statement of Decision (App. 69)[6] and on February 24, 1998, entered final judgment against the defendants, Petitioners, and other non-parties[7]. (App. 28)

Respondent served Petitioners by mail a Notice of Entry of Judgment on March 3, 1998 (App. 83 - 89). Within the sixty day statutory time period to appeal[8], Petitioners commenced an

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6 This has been provided pursuant to Rule 14(1)(i)(ii) or (vi) although whether the Statement of Decision is relevant to this action is dubious in that the findings of fact made arose out of the evidence presented only by parties other than Petitioners while prohibiting Petitioners to meet the evidence (to which Petitioners contend they clearly are able).

7 Upon their names being written into the final judgment, these non-parties transformed into parties the moment they became liable for the judgment.

8 California Rules of Court Rule 2.

appeal (#B122092).[9] However, Respondent filed a motion to dismiss Petitioners' appeal as untimely. In support of its motion to dismiss, Respondent attached a minute order indicating service on February 24, 1998 (App. 19 - 18), the day the trial court had signed the judgment.[10] The motion to dismiss was granted and the appeal was dismissed as having been untimely filed (App. 18). Petitioners' petition for rehearing to the court of appeal and Petitioners' petition for review to the California Supreme Court were both denied, the last of which occurred on October 21, 1998 (App. 17).

On December 21, 1998, Petitioners filed the complaint below in the Superior Court of California for the County of Los Angeles (#BC202691) seeking to have the judgment set aside for lack of jurisdiction over Petitioners. The trial court sustained Respondent's demurrer and ordered the action dismissed. (App. 13 - 14) The trial court signed an order submitted by Respondent giving the following reasons for the dismissal:

"1. The Complaint fails to state facts sufficient to constitute a cause of action in that the action is barred by an affirmative defense, namely, res judicata.

"2. The Complaint fails to state facts sufficient to constitute a cause of action in that it does not specifically plead that the grounds for relief is either extrinsic fraud or mistake. In light of the record before the court, the Complaint cannot be amended to do so.

"3. The Complaint fails to state facts sufficient to constitute a cause of action in that it does not specifically plead the absence of any remedy at law. In light of the record before the court, the Complaint cannot be amended to

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9 Commenced by filing a Notice of Appeal on May 1, 1998.

10 Notably, although this minute order had been served upon the defendants' trial counsel, but not on any of Petitioners themselves or Petitioners' attorney of record.

do so." (App. 15 - 16)

Petitioners again appealed the decision. The appellate court affirmed the dismissal of their action (App. 3 - 12) and denied their petition for rehearing (App. 2). The California Supreme Court denied Petitioners' petition for discretionary review (App. 1). This Petition follows.

Federal Questions Raised Below

Petitioners asserted that their rights under the Constitution of the United States had been violated in their original complaint filed below in the Superior Court of California for the County of Los Angeles on December 21, 1998 (#BC202691) (App. 73). Petitioners continued to assert their federal constitutional rights in the trial court in their opposition to Respondent's demurrer. (App. 71) On February 8, 1999, the trial court sustained Respondent's demurrer and the entirety of the trial court's order is contained at App. 16 - 17.[11]

On appeal to the Second District Court of Appeal of the State of California (#B130037), these rights were vigorously asserted in their opening and reply briefs. (App. 74 - 75) The opinion of the court of appeal addresses Petitioners' extensive[12] constitutional claims and arguments virtually exclusively in a footnote. (App. 13, fn. 10)

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11 Petitioners did not specifically cite to the trial court Donald E. Nelson v. Adams USA ___ U.S. ___, 120 S.Ct. 1579, 146 L.E.2d 530 (April 25, 2000) because it was not published until two months later.

12 By "extensive," Petitioners mean that of the well over forty pages comprising Petitioners' opening brief, over thirty of them were argument, at least twenty of those pages were focused on Petitioners' federal constitutional rights, citing numerous Supreme Court cases, constitutional provisions, and applying them to the facts of the case.

The Supreme Court of the United States decided Donald E. Nelson v. Adams USA, Inc. on April 25, 2000 just two days before oral argument to the Second District Court of Appeal of the State of California. Petitioners argued the case to the court which stated that they were familiar with it but stated that it did not govern this case stating a short version of what they stated in its opinion which can be found at App. 13.

In their Petition for Rehearing filed after the trial court's order of dismissal was affirmed, Petitioners continued to assert that their rights under the United States Constitution had been violated and specifically addressed the Nelson case (App. 75 - 76) as they continued to do so to the Supreme Court of the State of California in their petition for discretionary review (#S089232). (App. 76)

REASONS FOR GRANTING THE PETITION

I.

IT IS INCONSISTENT WITH FEDERAL DUE PROCESS TO DENY NON-PARTIES THE RIGHT TO BE HEARD REGARDLESS OF HOW SURE THE TRIAL JUDGE IS THAT A CORPORATE DEFENDANT IS THEIR ALTER EGO

The principles that were violated were well-established in American jurisprudence. By refusing Petitioners the right to defend against the allegation that the corporate defendant was Petitioners' "alter ego,"[13] the Court simply swept in a non-party, named the party to the judgment, issued a writ of execution,

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[13] For a history of the doctrine, see Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc. 933 F.2d 131 (2nd Cir. 1991)

and seized the non-parties' property[14], without providing Petitioners any moment to be heard and say, "the corporate defendant is not my alter ego" and "here is my proof." At best, Petitioners were witnesses to a proceeding limited to responding to what the parties asked of them, and in fact, the court refused to permit Petitioners to inject any of what Petitioners wanted to say.

The United States Supreme Court has long held these principles almost sacred. For example, in Scott v. McNeal 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896 (1894), the Court asserted,

> "The words `due process of law,' when applied to judicial proceedings...`mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution - that is, by the law of its creation - to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.' Pennoyer v. Neff, 95 U.S. 714, 733."

id. at 46

> "Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

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[14] To date, through sales of real and personal property, Respondent has ultimately collected most of the judgment from Petitioners and some from the defendants who had been permitted to participate in the trial.

Brinkerhoff-Faris Trust & Savings Co. v. Hill 281 U.S. 673, 680, 50 S.Ct. 451, 74 L.Ed. 1107 (1930)

> More recently, the United States Supreme Court stated,
>
> "In disposing of the first issue, there is no occasion to linger long. It is clear that failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law. `Many controversies have raged about the cryptic and abstract words of the Due process Clause but there can be no doubt that at minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Mullane v. Central Hanover Tr. Co., 339 U.S. 306, at 313"

Armstrong v. Manzo 380 U.S. 545, 550, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)

> "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."

Boddie v. Connecticut 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)

> "The essence of due process is the requirement that `a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.' Joint Anti-Fascist Comm. v. McGrath, 341 U.S., at 171-172"

Mathews v. Eldridge 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18, (1976)

The fact that Petitioners knew of the proceeding is irrelevant. Petitioners had no right (or obligation) to answer any allegation as none had been filed or served against Petitioners (yet Petitioners tried to appear at trial and were ejected as mere witnesses). No motion was filed as would be the case in all other alter ego cases allowing the proposed new judgment debtor to defend against the allegation that for the purposes of that lawsuit, that the judgment debtor and the corporate defendant should be held to be a single enterprise. Petitioners were just written into the judgment by Respondent and the court accepted it.

> "Nor can extra-official or casual notice...be deemed a substantial substitute for the due process of law that the Constitution requires....`It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court."

Coe v. Armour Fertilizer Works 237 U.S. 413, 424-5, 35 S.Ct. 625, 59 L.Ed. 1027 (1915)

It should take no great moment to see the unconstitutionality of the act of making one liable for a judgment the instant they were made a party and never providing the party any opportunity to defend itself, particularly in the alter ego context where none of Petitioners (or any of the other several companies added) held any ownership, management, or positions of the corporate defendant. Just as was stated in Sniadach v. Family Finance Corp 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969),

> "Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (citation omitted) this...procedure violates the fundamental principles of

due process."

id. at 342

II.

THE CALIFORNIA COURT OF APPEAL ERRED IN NOT FOLLOWING DONALD E. NELSON V. ADAMS USA, INC. (APRIL 25, 2000) WHICH HELD THAT DUE PROCESS AFFORDS EVERY PARTY THE OPPORTUNITY TO DEFEND REGARDLESS OF JUDICIAL PREDICTIONS OF THE OUTCOME OF THE PROCESS

Two days prior to oral argument at the Second District Court of Appeal of the State of California, a unanimous Supreme Court of the United States decided the case of Donald E. Nelson v. Adams USA, Inc. (April 25, 2000) ___ U.S.___, 120 S.Ct. 1579, 146 L.Ed.2d 530.

In Nelson, the Court rejected the idea that a trial court's perception that a litigant has no case to present is relevant as to whether the litigant has the right to legal notice and to a meaningful opportunity to be heard. Just like in the trial court below and the Second District Court of Appeal's opinion filed in the case below on May 9, 2000, the lower court in Nelson had misguidedly stated,

> "Instead, the Federal Circuit reasoned that nothing much turned on whether the party opposing Adams' claim for costs and fees was OCP or Nelson. `[N]o basis has been advanced...to believe anything different or additional would have been done to defend against the allegation of inequitable conduct had Nelson individually already been added as a party or had he been a party from the outset.' 175 F.3d, at 1351."

Nelson, supra. 120 S.Ct. at 1587

The superior court (in the original action) said the same thing in its Statement of Decision:

> "Had the alter egos been allowed to participate directly, the alter egos could not have produced any evidence that would have affected the outcome of the trial." (App. 62)

The Nelson opinion states,

> "We neither dispute nor endorse the substance of this speculation. We say instead that judicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated."

Nelson, supra. 120 S.Ct.at 1587

The Second District Court of Appeal below also relied upon factual findings found after a trial to which Petitioners were not parties and were not provided the opportunity to meet the evidence produced by the parties in that action stating,

> "In its statement of decision, the superior court provided a lengthy discussion of the alter ego issue and the three `key' factors. That discussion is so detailed that we find it difficult to even to summarize." (App. 9)

In Coe v. Armour Fertilizer Works 237 U.S. 413, 35 S.Ct. 625, 59 L.Ed. 1027 (1915), the United States Supreme Court stated, "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. id. at 424

The Second District Court of Appeal was not only told about Nelson at the oral hearing, but in a Petition for Rehearing. (App. 75 - 76) Yet, in its opinion, affirming the lower court, the only mention to Nelson provided was a footnote ("Thus, the present case is distinguishable from *Nelson v. Adams USA, Inc.* (April 25, 2000) ___ U.S. ___ [2000 WL 459282].") The Second District distinguished this case from Nelson by stating that Petitioners "received adequate notice and an opportunity to be heard on the alter ego issue." (App. 13)

The Second District Court of Appeal was correct on the point that the issue was about whether adequate notice and opportunity to be heard on the alter ego issue was afforded Petitioner, but on what basis did it state that Petitioners had in fact been afforded adequate notice and opportunity to be heard and thereby distinguish Nelson? The alleged factual basis of this distinguishing is as follows:

1. Gloria Sarno was called as a witness by both Respondent and the original defendants

2. There were discovery disputes between Gloria Sarno, as a witness, and Respondent before the trial.

3. The Sarno parties were allowed to present evidence at trial on the alter ego issue.

(App. 10 - 13)

Starting with the last of these bases first, were that true, this Petition would not be here today, for the fact is that this is simply not true. What the Second District Court of Appeal appears to be saying is that because Mrs. Sarno was called as a witness by the parties of that lawsuit (#1 above), the "Sarno parties" were allowed to present evidence in their own defense which has already been discussed and is obvious, is not adequate opportunity to be heard. The only other possible

explanation is that the Second District Court of Appeal is mistaken and did not understand that Petitioners were never allowed to present any of their evidence at the trial and were completely restricted to answer the questions posed to them by Respondent's attorneys and the original defendants' attorneys.[15] But the fact of the matter remains that mistaken or not, being simply a non-party witness to a matter does not provide one a meaningful opportunity to defend.

As witnesses, one has no right or obligation to defend themselves. "It is settled that one who is not a party to a proceeding may not make a motion therein...It is a recognized rule of legal procedure that no one not a party to the action, without any disclosed interest in the result thereof, can be permitted to thrust himself into the controversy by filing any character of pleading therein...." Lavaysse v. Superior Court (1944) 63 Cal.App.2d 223, 225 Coe. supra. 237 U.S. at 424 ("The fallacy of this is that it ignores the issue of law raised by the petition...and substitutes an issue of fact for which he was not summoned and which he has not consented to litigate.")

But Petitioners *did* try to be heard - at every step of the way - but the court refused their requests to produce evidence at the trial and to have their own attorney examine witnesses and produce argument. Upon discovery that the final judgment was not only in favor of Respondent, but that Respondent was not going to be filing a motion to add Petitioners as defendants as they simply somehow got their names written into the judgment, Petitioners appealed, but, as already stated, untimely and the appeal was dismissed ultimately causing the lower action to be filed.

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15 It bears repeating that Petitioners were added not as the result of any motion or application being filed, but simply by the judicial officer writing their names into the judgment with no opportunity to be heard afforded Petitioners either before or after doing so.

In fact, just as in Nelson, Respondent could have provided Petitioners with legal notice of the action prior to trial with a summons and complaint and an opportunity to be heard and to participate in the trial rather than have their hands tied behind their back, but it chose not to for three years prior to trial - for curious reasons known only to itself.

Respondent could have named Petitioners in the original complaint when they had already been serving administrative subpoenas upon Petitioners at the issue of alter ego but they did not and this left Petitioners with no remedy but wait for an anticipated motion or amended pleading which never ever came (except the motion to add them as parties which was even denied). Yet, at the conclusion of the trial, without having transformed Petitioners from mere witnesses to parties, the Court named Petitioners in the Judgment and at the exact moment they were written into the Judgment, they were found "guilty" as charged. In Nelson, the Supreme Court referenced a very similar situation (actually a situation less egregious because in Nelson, a motion to add had been filed, but the problem was that after being added, the added party had to be given an opportunity to be heard *as a party*, and the fact that a concurrent motion had been filed to also bind them to a liability was not relevant since until added as a party, they had no cause to respond to the motion). The Supreme Court stated,

> "Respondent Adams made no...mistake [concerning the identity of the proper party]. It knew of Nelson's role and existence and, until it moved to amend its pleading, chose to assert its claim for costs and fees only against OCP."

Nelson supra. 120 S.Ct. at 1585

Respondent not only knew of the existence of Petitioners, Respondent was prepared on the first day of trial to put on a two month trial concerning Petitioners in their absence and when they were not parties to the action. In fact, it was not

until after the entry of the final judgment, that Respondent sent a Notice of Entry of Judgment to Petitioners believing that by that point it was time to respect some of their rights.

III.

THE RIGHT TO BE HEARD EMPHASIZED IN DONALD E. NELSON V. ADAMS USA, INC. (APRIL 25, 2000) SHOULD APPLY EVEN WHERE THE NON-PARTY IS HELD LIABLE BASED UPON THE DOCTRINE OF ALTER EGO

In Viking Industrial Security, Inc. v. National Labor Relations Board 225 F.3d 131, 136, 2000 WL 1218799 (2nd cir. 2000), the court stated,

> "In this case, our holding is no procedural technicality. The principals of the two companies were at odds. The only named respondent was headed for insolvency and arguably lacked incentive to mount a strenuous or expensive defense to the unfair labor practice charge."

The Viking opinion proceeds to cite Nelson, supra as stating, "[D]ue process...demand[s] a more reliable and orderly course.").

Some lower courts have already addressed this issue:

> "Without proof of the alter ego relationship, we cannot assume that the nominal owners have received their day in court nor that they can be expected to know that plaintiff will attempt to execute on their property. The constitutional rights of the Dumrong companies cannot be eliminated from the balance simply because Strick alleges they are alter egos of the judgment debtors....¶... Because the attached property is nominally owned by the Dumrong companies, we must also consider their interests....¶...Prior to the deprivation, no requirement of

> notice, hearing or other safeguard existed to protect the Dumrong companies from inaccurate conclusory allegations."

Strick Corporation v. Thai Teak Products Company, Ltd. 493 F.Supp. 1210 (E.D. Penn. 1980)

Petitioners do not seek to have Respondent have to reprove its case against the original defendants nor to have Respondent prove it against Petitioners. Petitioners contend, however, that Petitioners have a federal constitutional right to dispute whether Petitioners should be held liable for the debts of another company. Whether based upon alter ego, assignment, licensee, respondeat superior, or any one of a number of other legal bases for holding one liable for the acts of another, Petitioners had the right to deny it was in the alleged relationship and be heard on its denial.

This is not a case where the alter ego relationship remains undisputed such as in D.H. Overmyer Telecasting Co. v. Hadar Leasing International Co., Inc. 53 B.R. 963 (N.D., Ohio, E.D. 1984),

> "The intervenors contention that procedural due process requires that they receive a summons and be afforded the opportunity to actively participate in the trial proceedings is not well taken. As to the issues in these proceedings, the due process rights of the intervenors have been satisfied because a party whose interests are identical to theirs represented the intervenors in the trial court proceedings....Since Mr. Overmyer received the required due process procedures, the intervenors, who do not dispute being his alter ego, have also been afforded the required constitutional protections...."

Petitioners do dispute that they are in an alter ego relationship with F.B.S., Inc. and have always wanted to be heard in their own defense. It is this that constitutionally

Petitioners have the right to say and defend yet to this date have been prohibited from doing so and to a shockingly routine manner.

To the extent that Nelson did not directly govern a situation that includes such a situation, it should. In the criminal context, one is innocent until proven guilty and in American jurisprudence, Petitioners are entitled to their day in court before having $400,000 taken from them (as has already almost completely been done). Nelson should be extended to apply to protect persons alleged to be in an alter ego relationship with corporate defendants.

IV.

CALIFORNIA'S CODE OF CIVIL PROCEDURE §187 IS UNCONSTITUTIONAL TO THE EXTENT THAT IT IS APPLIED TO PERMIT THE ENTRY OF A JUDGMENT AGAINST SOMEONE THE INSTANT THE PERSON IS MADE A PARTY TO THE PROCEEDING AND DEPRIVES THEM OF ANY POST-JUDGMENT PROCESS TO CONTEST THE ENTRY OF THE JUDGMENT AGAINST THEM

Petitioners are not contesting the doctrine of alter ego itself, or the right in appropriate cases to bind non-parties to judgments following an orderly process that respects the due process rights of the non-parties, or, even the application of a state's statute that allows for this to occur within the boundaries of the Due Process Clause. Yet, the application of a state statute, such as California Code of Civil Procedure §187 (App 72) to bind a non-party to a judgment without providing the non-party any right to defend itself against the allegation that there is a sufficiently close relationship between it and the corporate defendant to hold the non-party to the already adjudicated findings, is being contested.

This case is one step removed from other cases where persons that were not named in a judgment had their property taken without notice or opportunity to be heard such as National Stabilization Agreement of the Sheet Metal Industry Trust Fund 71 F. Supp.2d 427 (M.D., Penn 1999), where it was stated,

> "While the Strickland and ABC cases involved allegations that one entity was actually the `alter ego' of another, we find their reasoning equally applicable to the present situation....Regardless, the situation is the same as in Strickland and ABC; an entity who was not the named judgment debtor had its property attached with no notice or hearing."

In the instant case, Petitioners were named as a judgment debtor but this is hardly a significant distinction. It does not take any significant energy to physically write the names of people and companies into a judgment. The significance between those named and those not named would only exist in the situation where those named were named consistent with the Due Process Clause, to wit, after they had received legal notice of allegations against them and a meaningful opportunity to speak in their own defense prior to entry of judgment (or, even after in some cases, as Petitioners were denied both).

V.

NONE OF THE REASONS PROVIDED BY THE TRIAL COURT FOR SUSTAINING RESPONDENT'S DEMURRER ARE CONSTITUTIONALLY PROPER

The court's acceptance of Respondent's argument that Petitioners were barred based upon the doctrine of res judicata is not clear, at best, and absurd at worst. What was being argued was simply never clear. It seems that Respondent may have been arguing that the issue of jurisdiction of the trial court

over Petitioners has already been decided by the court because, "[i]n order to find that the alter-ego defendants were subject to the jurisdiction, the court had to find that it exercised jurisdiction over them." Yet Petitioners were not a part of this implied adjudication and adjudication is a core element of the doctrine of res judicata. Moreover, this is obviously grossly circular.

Respondent appeared to also be arguing that because the court ruled that Petitioners were "one and the same" as F.B.S., Inc., and F.B.S., Inc. had a "vigorous" adjudication of the issues, the doctrine of res judicata barred Petitioners' action below. This is also circular – Petitioners are not related to F.B.S., Inc. and Petitioners have never been shown to be accept in a trial wherein Petitioners were literally ordered to stay out of the trial.

The only other discernable basis of Respondent's argument may be that Petitioners were barred because Petitioners "clearly had a right to appeal from the judgment against them[,]" "neither [Respondent] nor the trial court in anyway prevented them from filing a Notice of Appeal[,] and the "dismissal by the Court of Appeal of their Notice of Appeal was attributable to their filing of an untimely notice." Most fundamentally, this shotgun res judicata argument is faulty at its core. For example, in a California state case, the issue was directly addressed. In Rochin v. Pat Johnson Manufacturing Co. 67 Cal.App.4th 1228 (1998), similar arguments were made and rejected by the appellate court,

> "Defendants contended below and the trial court agreed in sustaining plaintiff's demurrer that the present action is barred by the doctrine of res judicata. Specifically, defendants assert that plaintiff's failure to file a cross-appeal from the amended judgment resulted in the amended judgment becoming final and having preclusive effect...We disagree.
>
> "The doctrine of res judicata is inapplicable to void

judgments....

> "...Plaintiff's failure to file a cross-appeal from the amended judgment, thus in a sense allowing it to become final, plainly does not give the amended judgment preclusive effect. The amended judgment is a nullity, and can have no such effect....
>
> "...We conclude that the trial court erred in sustaining defendants' demurrer on the basis of res judicata."

id. at 109

Thus, the "issue" remains, whether the judgment in the prior proceeding is void as to Petitioners as the complaint alleged, but concerning which Petitioners have been prevented from being heard. Not even the dismissal of an appeal as untimely has any preclusive effect,

> "The following are typical dismissals which are not on the merits and consequently not res judicata.
>
> "(a) Dismissal for lack of jurisdiction. (See GMS Properties v. Superior Court (1963) 219 Cal.App.2d 407, 415, 33 Cal.Rptr. 163; Nichols v. Canoga Industries (1978) 83 Cal.App.3d 956, 967, 148 Cal.Rptr. 459, citing the test;..."

7 Witkin, California Procedure, Judgment, §226, p. 663

The reason Petitioners' appeal was dismissed was because after they found out about the judgment and they tried to commence an appeal, it was untimely (as already discussed). An untimely filed Notice of Appeal does not confer any jurisdiction to the appellate court and the appeal must be dismissed. Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc. 15 Cal.4th 51, 56, 61

Cal.Rptr. 2d 166, 168 (1997)[16]

Moreover, the argument that because the court exercised jurisdiction it necessarily found it had jurisdiction and thus the matter of jurisdiction has already been decided is patently circular. Perhaps the nomenclature of the alter ego area of the law adds to the confusion. When a party is held liable for the debts of another pursuant to the alter ego doctrine, words and phrases such as "one and the same," "single enterprise," and "alter ego" are normally used. However, neither factually, nor legally, are the parties really considered one and the same. For example, in Mesler v. Bragg Management Co. 39 Cal.3d 290 (1985), the California Supreme Court stated,

> "However, and this is where the court in Fuls went astray when a court disregards the corporate entity, it does not dissolve the corporation. `it is often said that the court will disregard the `fiction' of the corporate entity, or will `pierce the corporate veil.' Some writers have criticized this statement, contending that the corporate entity is not a fiction, and that the doctrine merely limits the exercise of the corporate privilege to prevent its abuse.' (6 Witkin, op. cit. supra. §5 at p. 4317....)"

id. at 300

The court continued,

> "Rather, it is that under certain circumstances, a hole will be drilled in the wall of limited liability erected by the corporate form; for all purposes other than that for which the hole was drilled, the wall still stands. When it is claimed that a parent corporation should be liable

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[16] To be clear, even the notices of entry of a void judgment are "equally void, ineffectual for any purpose and meaningless." People v. Cox 202 Cal.App.3d 574, 580 (1988)

> because it is the alter ego of its subsidiary, equity commands that the corporate wall be breached. Yet the wall remains: the parent is liable through the acts of the subsidiary, but as a separate entity."

id. at 301

In fact, it might be noted, that a properly noticed and served post-judgment motion pursuant to California's Code of Civil Procedure §187 was the opportunity for Respondent to bind Petitioners if Respondent prevailed (and visa versa). In that instance alone would the doctrine of res judicata apply.

The other reasons given by the trial court in sustaining Respondent's demurrers are even more curious. There is no issue of extrinsic fraud or mistake. Petitioner's only "mistake" was not being superhuman and able to communicate to the court despite being locked out of the courtroom as "mere witnesses." The allegation that the court wrote in Petitioners' name to a judgment contrary to the constitution does not have any requirement of an allegation of "extrinsic fraud or mistake."

Likewise, as stated above, a void judgment may be collaterally attacked at anytime, whether by separate action or awaiting some type of enforcement action. Petitioners at all times tried to be heard yet nobody would permit them. They even tried to exercise a remedy at law, to wit an appeal, but since they were not provided with any notice of the Clerk's February 24, 1998 minute order (until Respondent moved to dismiss their appeal as untimely), Petitioners did not get an appeal timely filed.

CONCLUSION

The Second District Court of Appeal for the State of California clearly reached a result inconsistent with Due Process as Americans know and treasure it, improperly refused to follow the unanimous Supreme Court in Nelson, and

improperly permitted California's broad powers statute to be applied to deprive a person of its property without an opportunity to be heard.

It is absolutely clear that Petitioners were denied fundamental due process rights. It is also clear that unless the Supreme Court of the United States grants this application to review the matter, more people like Petitioners will have their property taken from them by the government. As far back as the Mayflower Compact of 1620 and the Declaration of Independence of 1776, this land determined that it would be a land of law, not of men, and that the constitution of this land would be paramount.

Respectfully submitted,

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